No. 86-2013

Supreme Court, U.S.
FILED
AUG 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

LAURA JANE WHITEHORN, A.K.A. ANN MORRISON,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in holding that evidence seized pursuant to a valid warrant could be admitted when the evidence was first discovered during a warrantless bomb sweep.

A superseding indictment returned in the United States District Court for the District of Maryland charged petitioner with possession of implements used in making false identifications, in violation of 18 U.S.C. 1028(a); possession of false identification documents, in violation of 18 U.S.C. 1028(a)(3); assaulting an FBI agent, in violation of 18 U.S.C. (& Supp. III) 111 and 1114; possession of an unregistered Uzi submachine gun, in violation of 26 U.S.C. 5861(d) and 5871; possession of a silencer, in violation of 26 U.S.C. (& Supp. III) 5861(d) and 5871. Prior to trial, petitioner moved to suppress evidence found in her Baltimore apartment. The evidence in question was observed during a warrantless bomb sweep of the apartment, but it was not seized until a warrant was obtained to search the apartment. Following two evidentiary hearings,

the district court suppressed the evidence. The court of appeals reversed the suppression order. Pet. App. 3-21; 813 F.2d 646 (1987).

1. The evidence at the suppression hearings showed that the FBI was conducting an extensive investigation into the whereabouts of federal fugitives Marilyn Buck, Linda Evans, Susan Rosenberg, and Dr. Alan Berkman.[1] All were suspected members of a radical underground group responsible for several bombings of public buildings and the 1981 armed robbery of a Brinks armored truck in New York. During the robbery and an ensuing shoot-out, a Brinks guard and two New York police officers were killed. In 1984, Rosenberg was arrested in New Jersey in a U-Haul van containing 740 pounds of dynamite, blasting caps, 14 weapons, ammunition, and numerous false identification documents. Prior to May 1985, the FBI learned that the fugitives had moved the base of their operation from Connecticut to Baltimore, Maryland. On May 9, 1985, Evans, Buck, and Berkman were seen at the Yorkwood Apartments in Baltimore. Evans and Buck left

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[1] Our statement of facts is taken from the opinion of the court of appeals, from the brief filed by the United States in the court below, and from the brief filed by the United States in *United States* v. *Laura Whitehorn*, No. 87-1122, which is now pending in the Second Circuit. The evidence seized from petitioner's Baltimore apartment has led to federal criminal charges against petitioner and her associates in the District of Maryland, the District of Connecticut, and the Southern District of New York. In several of those proceedings, the defendants have sought suppression of the evidence that was seen during the warrantless bomb sweep of the Baltimore apartment but seized during the subsequent warrant search. The pertinent facts have been developed at suppression hearings conducted in these cases. The Fourth Circuit in the instant case and the United States District Court for the Southern District of New York in the case referred to above and in a prosecution against associate Linda Evans have ruled that the evidence seen during the bomb sweep is admissible under the inevitable discovery doctrine. A contrary conclusion was reached in *United States* v. *Evans*, 629 F. Supp. 1544, 1553-54 (D. Conn. 1986).

the apartment on May 10 and were arrested on May 11 in New York. Each woman was carrying a fully-loaded firearm at the time of her arrest.[2]

By noon on May 11, FBI agents ascertained that the fugitives had been residing in Apartment D in the Yorkwood Apartments; the agents immediately began preparing an affidavit for a warrant to search that apartment. During the next five hours, the agents compiled a lengthy affidavit detailing their investigation of the fugitives. While the affidavit was being prepared, other agents sought admission to the apartment to look for Berkman. The agents knocked, identified themselves, and announced that they were looking for Berkman, for whom they had an arrest warrant. Petitioner, who was within, answered the agents but refused to admit them. After hearing the sound of paper being torn within the apartment, the agents broke open the door and arrested petitioner on the charge of harboring Buck. They conducted a brief security sweep of the apartment. Finding no one else and without seeing any evidence, they departed. One agent guarded the apartment from outside.

Fearing that petitioner might have set off a timed explosive device in the apartment prior the agents' entry, the agents requested that a bomb expert be sent to the apartment to sweep the apartment for explosives. Forty-five minutes later, an FBI bomb technician arrived and thoroughly searched the apartment for explosive devices. During the search, he saw numerous items of evidentiary value, although he did not seize them. Subsequently, on the basis of information known to the agents prior to the bomb sweep, a search warrant was issued for the apartment. Pursuant to the warrant, the agents reentered the apartment and seized an Uzi submachine gun, two hand-

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[2] The facts pertaining to the Brinks robbery and Buck's arrest are set out in greater detail in *United States* v. *Buck*, 804 F.2d 239 (2d Cir. 1986), and *United States* v. *Buck*, 813 F.2d 588 (2d Cir. 1987).

guns, a silencer, a cabinet full of already assembled bomb detonating devices, hundreds of blank social security cards, and a machine for manufacturing false identification, all of which had been seen during the bomb sweep. They also seized numerous false identifications and other evidence that had not been seen during the bomb sweep.

2. Because the FBI agents had not ordered the apartment building evacuated prior to the bomb sweep, the district court found that the warrantless sweep was not supported by exigent circumstances. The court found, however, that the search warrant was issued on probable cause known to the agents prior to the illegal bomb sweep. Thus, the court held that the search warrant provided an untainted, independent source for all the evidence that was discovered for the first time during the warrant search. Accordingly, the court ruled that those items were admisssible. The court, however, suppressed all the evidence that was seen during the bomb sweep.[3]

3. The court of appeals reversed the suppression order. Pet. App. 3-21. The court agreed with the district court that the warrantless bomb sweep was not justified by exigent circumstances. *Id.* at 13-14. And the court agreed that the search warrant affidavit contained sufficient untainted evidence to establish probable cause. *Id.* at 14. The court ruled, however, that the district court should have

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[3] Initially, the district court suppressed only the Uzi submachine gun. The court severed the count charging possession of the Uzi so that the government could appeal the suppression ruling, and trial commenced on the remaining counts. During trial, the district court stated that it had intended that its suppression order reach all items of obvious evidentiary value that were seen during the bomb sweep. The court declared a mistrial and conducted a second evidentiary hearing to ascertain which items were seen by the bomb technician. The court then ordered the suppression of all those items. The government appealed this additional suppression ruling, and the two appeals were consolidated.

applied the inevitable discovery doctrine to determine the admissibility of the evidence that was first seen during the bomb sweep but was seized during the subsequent warrant search. *Id.* at 17-20. The court remanded the case to the district court for such a determination.

4. Petitioner correctly notes that this case presents the same question on which certiorari was granted in *Murray* v. *United States*, No. 86-995 (Mar. 9, 1987), and *Carter* v. *United States*, No. 86-1016 (Mar. 9, 1987). For this reason, petitioner and the government, with the district court's approval, have agreed to postpone the remand hearing on inevitability and the trial until *Murray* and *Carter* are decided.[4] Nevertheless, because this case is in an interlocutory posture, there is no reason to hold the petition pending a decision in those cases. If *Murray* and *Carter* are decided adversely to the government, the district court will be in a position to give petitioner the benefit of this Court's ruling prior to trial. Petitioner will receive no greater advantage by having her case held by this Court and remanded for further proceedings in light of *Murray* and *Carter*. Because a remand from this Court following the decision in *Murray* and *Carter* would have the effect of requiring a further remand by the court of appeals, holding this interlocutory petition pending the disposition of *Murray* and *Carter* would only delay the ultimate disposition of this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1987

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[4] Petitioner is currently serving a two-year sentence that was imposed after she pleaded guilty in the Southern District of New York to making false statements in a passport application, in violation of 18 U.S.C. 1542.

U.S. GOVERNMENT PRINTING OFFICE: 1987— 181-463/40455